IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1707 OF 2003
WITH
WRIT PETITION NO.1003 OF 2003

Union of India through
the Chief Workshop Manager,
Central Railway, Parel,
Mumbai. ... ... Petitioner

Versus

1. General Secretary,
Indian Railway Technical Staff Association,
Parel Mumbai.

2. Mr.Mohanlal Gupta,
Trans. Fitter III,
Workshop Parel, Mumbai. ... Respondents

Mr.Suresh Kumar with Ms.Suchitra Kamble for petitioner.

Mr.Rahul Walia for respondent No.2.
(In both matters)

CORAM : H.L.GOKHALE, J.

Dated : 28th January 2005

ORAL JUDGMENT :

1. Both these petitions are filed by the Union of India through the Chief Workshop Manager of Central Railway, Parel, Mumbai. They seek to quash two orders passed by the Central Government Industrial Tribunal in two proceedings which were initiated by respondent No.1-General Secretary of the Industrial Railway Technical Staff Association on behalf of respondent No.2-Mohanlal Gupta, who is working as a Diesel Transmission Fitter,

Grade-III.

2. The brief facts leading to these petitions are as follows:-

. Respondent No.2 joined the service of the Central Railway in its workshop at Parel, Mumbai as a Diesel Transmission Fitter, Grade-III sometimes in the year 1985. It is alleged that sometimes in the year 1995 the Railways learnt that respondent No.2 was involved in arranging fraudulent appointment of 17 persons in Western Railway and for which he received illegal gratification from some 11 persons. A complaint was registered on 9th April 1996 and respondent No.2 came to be suspended initially for a period of about 17 months from 23rd May 1996 to 24th October 1997. It is material to note that during this period, for a short time i.e. from 4th February 1997 to 15th February 1997 he was in custody which was not informed to the Railway Authorities. In October 1997, the suspension was revoked with a view to start the initial enquiry but that time the Railways came to know about the arrest which was for a period of about ten days as stated above. Respondent No.2 was, therefore, suspended once again on 3rd August 1998. He was

issued a charge-sheet on 19th March 2001. The second suspension came to be revoked on 19th March 2001 and respondent No.2 was transferred to Kurduwadi in District Solapur along with the post.

3. During his second period of suspension, respondent No.2 raised an industrial dispute through the 1st respondent-Union. The dispute was referred for the adjudication of the Central Railway Industrial Tribunal by order dated 30th May 2000 and the matter was numbered as Reference CGIT-2/33 of 2000. The dispute referred was as follows:-

> " Whether the action of the management of Parel Workshop Central Railway, Mumbai by suspending Mr.M.L. Gupta, transmission fitter without issuing the charge-sheet and not taking the action for more than one year is justified or not? If not, what relief the workman Mr.M.L. Gupta is entitled to? "

Thus, as far as this dispute is concerned, it was split into two parts. The first part was whether the action of suspension without issuing the

charge-sheet was justified and the second part was as to whether not taking the action (i.e. further action, if any) for more than one year was justified or not. After the parties filed their pleadings, evidence was led. The Tribunal gave its Award on 30th September 2002. It came to the conclusion that both these actions of the petitioner were unjustified and improper. It, therefore, directed the management to regularise the 2nd respondent's period of suspension and pay him monetary benefits as per law. It is this Award which is under challenge in Writ Petition No.1707 of 2003.

4. Mr.Suresh Kumar, learned Counsel appearing for the petitioner, submitted that as far as the punishment of suspension imposed on the 2nd respondent is concerned, as can be seen, it was in two parts. The first suspension was revoked with a view to issue the charge-sheet but respondent No.2 was suspended once again since the Railway Authorities came to know about his having been arrested in the meanwhile as pointed out earlier. It is submitted that this suspension was as a matter of course under Rule 5(2)(a) of the **Railway Servants (Discipline** & **Appeal) Rules, 1968**, which reads as follows:-

" (2) A Railway servant shall be deemed to have been placed under suspension by an order of the competent authority:

(a) with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours. "

Mr.Suresh Kumar, therefore, submitted that at that time, there was no necessity to issue a charge-sheet. After the matter is looked into, necessary decision to issue a charge-sheet would be taken. He relied upon a judgment in the case of **Union of India vs. Rajiv Kumar reported in (2003) 6 SCC 516** where while dealing with the similar rule of deemed suspension being Rule 10(2) of CCS (CCA) Rules, 1965, the apex Court has held that Rule 10(2) is a deeming provision and creates a legal fiction. In fact, the actual order of suspension is not required to be passed thereunder. Mr.Suresh Kumar, therefore, submitted that as far as the first part of the dispute which was referred is concerned, the Tribunal ought to have held that there was no need to issue the

charge-sheet while suspending respondent No.2. The decision of the Tribunal was clearly in error, as far as that part is concerned.

5. As far as the second part of the dispute, namely, not taking action for more than one year is concerned, Mr.Suresh Kumar submitted that the Authorities need their own time to process the papers and take the decision as to whether the person concerned should be charge-sheeted in a departmental action or the Authorities should wait for the decision of the prosecution in criminal Court. If they decide to proceed departmentally then they issue a charge-sheet. In the instant case, what we find is that though respondent No.2 was suspended on the second occasion on 3rd August 1998, the charge-sheet was issued on 6th May 2000 i.e. nearly after one year and seven months. The enquiry based on that charge-sheet has still not proceeded and Mr.Walia appearing for respondent No.2-workman informs that not a single witness has been examined. Though Mr.Walia defended the order in its entirety, he submitted that in any case the second part of the order wherein the Tribunal has found fault with the railways for not taking any action for more than one year, that part should be left undisturbed.

6. As noted above, the second part of the Reference to the Tribunal was with respect to the justifiability of the prolonged period of suspension. The incidental question in this connection is with respect to the payment of appropriate subsistence allowance during the period of suspension. In paragraph 2.5 of the Statement of Claim, it is specifically stated that the management miserably failed to review the suspension and subsistence allowances payable to the workman after the period of three months on both the occasions of suspension i.e. after the expiry of 3 months from 23rd May 1996 on the first occasion and after expiry of 3 months counted from 3rd August 1998 on the second occasion. As far as the pay during suspension is concerned, the relevant rule is Rule 1342 (F.R.53)(1) of the Indian Railway Establishment Code which reads as follows:-

> " **1342. (F.R.53) Pay during Suspension**. - (1) A railway Servant under suspension or deemed to have been placed under suspension by an order of the competent authority shall be entitled to the following payments, namely-

(a) A subsistence allowance at an amount equal to the leave salary which the Railway servant would have drawn if he had been on leave on half average pay or on half pay and in addition dearness allowance, if admissible, on the basis of such leave salary.

Provided that where the period of suspension exceeds 3 months, the authority which made or is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first 3 months as follows:

(i) the amount of subsistence allowance may be increased by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons, to be recorded in writing, not directly attributable to the railway servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount not exceeding 50 per cent of the subsistence allowance admissible during the period of the first three months, if in the opinion of the said authority, the period of suspension has been prolonged due to reasons, to be recorded in writing, directly attributable to the railway servant;

the rate of dearness allowance will be based on the increased or, as the case may be, decreased amount of subsistence allowance admissible under sub-clauses (i) and (ii) above. "

7. Mr.Walia, learned Counsel appearing for respondent No.2 submitted that respondent No.2 was continued under suspension for two long periods until he was ultimately transferred to Kurduwadi on 19th March 2001. During both these periods i.e. first period from 23rd May 1996 to 24th October 1997 and the second period from 3rd August 1998 to 19th March 2001, the railways were duty bound to review the allowance payable to the 2nd respondent in which they have failed. If the

review was taken, it would have been noticed that the 2nd respondent was not responsible for delay of the enquiry, which has still not proceeded. Mr.Walia, therefore, submitted that the 2nd respondent ought to be paid 75% of his pay as per the aforesaid rule during each of these periods after the expiry of three months.

8. Thus, although the petitioners have their explanation with respect to the first part of the Reference, viz. suspending the 2nd respondent without charge-sheet (which could follow later on), as regards the second part of the dispute, I have to accept the submission of Mr.Walia. The government employees cannot be kept under suspension indefinitely without a review. The rule requires that the circumstances justifying continued suspension should be gone into after three months and the pay of the employee concerned has got to be revised in case he is not responsible for the delay in completion of the inquiry.

9. In the circumstances, having noted the submissions of both the learned Counsel and having gone through the rules, as far as this petition is concerned, though it succeeds partly in the sense

that the Award of the Tribunal faulting suspension without issuing the charge-sheet, will have to be declared as bad, the second part of the Award, namely, directing the petitioner to pay the 2nd respondent his monetary benefits as per rules, will have to be upheld. Mr.Walia points out that a similar view has been taken by a Division Bench of this Court in which Gokhale, J. was a member in the case of **S.N.Thampy vs. Textiles Committee** reported in **2001 III CLR 667**.

10. In the result, this petition i.e. Writ Petition No.1707 of 2003 succeeds in part. The petitioner is, therefore, directed to see to it that during both the period viz. the first period from 23rd May 1996 to 24th October 1997 and the second from 3rd August 1998 to 19th March 2001 the difference in the pay which ought to have been paid to the 2nd respondent-workman i.e. between the two figures of 75% and 50% should be released to the 2nd respondent. We direct this payment be made within three months hereafter. There will be no order as to costs.

11. Now, we turn to the second petition viz. Writ Petition No.1003 of 2003. As noted above, the 2nd respondent had raised the dispute with

respect to his suspension and that dispute was referred for adjudication by order dated 30th May 2000. It came to be numbered as Reference No.CGIT-2/33 of 2000. During the pendency of this Reference, the 2nd respondent was served with the charge-sheet on 19th March 2001 and the order of suspension was revoked on the same day and he was transferred along with the post to work at Kurduwadi. It is contended on behalf of the 2nd respondent that this transfer was in violation of the mandate under Section 33 of the Industrial Disputes Act, 1947 which provides that the conditions of service, etc. will remain unchanged under certain circumstances as provided therein during pendency of such proceedings before a Labour Court or a Tribunal. We are concerned with Section 33(1) which reads thus:-

> " **33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.** (1) During the pendency of any conciliating proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial

dispute, no employer shall -

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workman concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending. "

It is contended on behalf of respondent No.2 that he was expected to work in the workshop at Parel where he drew certain allowances. For example, he was receiving incentive bonus of about Rs.1,200/- per month in the workshop at Parel, whereas the workshop at Kurduwadi was a non-incentive depot. According to him, it amounted to his transfer to another cadre without his consent and that was impermissible. These changes were brought about during the pendency of the reference. Respondent

No.2, therefore, filed a Complaint under Section 33A of the Industrial Disputes Act which contains the special provision for adjudication as to whether the conditions of service changed during the pendency of proceedings. It came to be numbered as Complaint No.CGIT-2/1 of 2001. The petitioner filed its reply, evidence was led by the parties and thereafter, the Tribunal did come to the conclusion that a case was made out by respondent No.2. The Tribunal, therefore, passed an order on 9th August 2002 directing the petitioner to post respondent No.2 in Diesel Transmission Workshop at Parel i.e. in his parent cadre. It is this order which is assailed in this petition. The order has been stayed during the pendency of this petition.

12. Mr.Suresh Kumar, learned Counsel appearing for the petitioner, submitted that what is to be noted is that when respondent No.2 was transferred to Kurduwadi, he had himself submitted to the petitioner that he was prepared to go outside. In fact, when the evidence was recorded in the Complaint, in Para-15 of his cross-examination, the 2nd respondent stated as follows:-

" 15. No agreement was entered between

myself and railway department while recruitment that I will work only in Parel Workshop. It is correct to say that I have made representation dtd. 11.8.2000, mentioning therein that I may be posted to some other station where Diesel trade is existing. "

Mr.Suresh Kumar, therefore, submitted that as can be seen from the evidence, he was transferred as per his own representation. He cannot, therefore, be permitted to make any grievance in that regard. That apart, he submitted that Section 33(1)(a) is attracted, if the employer has altered the conditions of service to the prejudice of the workman. In the present case, respondent No.2 was under suspension. His suspension was revoked and thereafter he was transferred to another place where he drew his full wages. In fact, the grievance of respondent No.2 was that during the period of suspension he was being given only half the pay, though the suspension continued beyond three months and that it was contrary to the rules. Mr.Suresh Kumar, therefore, submitted that it was no case to be entertained under Section 33(1)(a) of the Industrial Disputes Act. He submitted that if this order remains on record,

the officers of the petitioner will be prosecuted for contravention of Section 33 in view of the penalty provided under Section 31 of the Industrial Disputes Act. This petition has, therefore, become necessary and interim order was sought for stay of the Award which has been running during the pendency of this petition.

13. Mr.Suresh Kumar submitted that under Rule 123 of the Indian Railway Establishment Code, the Railway Board has full powers to make rules of general application to Group C and Group D railway servants under its control. Respondent No.2 falls under Group C category. Rule 226 of these Rules provided that in the exigency of the service it was open to the President of India to transfer the railway servant to any other department. There was however no such corresponding right to the railway employees. This Rule 226 reads as follows:-

> " **226. Transfers**. - Ordinarily, a railway servant shall be employed throughout his service on the railway or railway establishment to which he is posted on first appointment and shall have no claim as of right for transfer to

another railway or another establishment. In the exigencies of service, however, it shall be open to the President to transfer the railway servant to any other department or railway or railway establishment including a project in or out of India. In regard to Group C and Group D railway servants, the power of the President under this rule in respect of transfer, within India, may be exercised by the General Manager or by a lower authority to whom the power may be re-delegated. "

14. Mr.Suresh Kumar relied upon a judgment of the apex Court in the case of **CIPLA Ltd. vs. Jayakumar R. & another reported in (1999) 1 SCC 300** where while dealing with the complaint under Section 33-A of the Industrial Disputes Act on account of transfer, the apex Court held that if there is a power of transfer, then a transfer effected in pursuance thereof would not amount to altering conditions of service. He submitted that in the instant case the Railway Administration had the full powers. In fact, it is only with a view to ameliorate the situation that the 2nd respondent, who was under suspension, was placed

on regular employment by transferring him on his own request and by revoking the suspension. This cannot be said to be in any way prejudicial to the employee concerned. Mr.Suresh Kumar, therefore, submitted that the order passed by the Tribunal ought to be quashed and set aside. In his submission, respondent No.2 was kept out of Mumbai so that he does not tamper with the witnesses. Since his suspension was continuing for a long time, it was deemed proper to transfer him so that the employee works and receives full wages, but at the same time, he is kept away from the place of the incident which led to the enquiry.

15. Mr.Walia, learned Counsel appearing for respondent No.2-workman, submitted that the term "cadre" has a definite meaning in the Indian Railway Establishment Code. Sub-rule (7) of Rule 103 gives the definition of cadre. Cadre means the strength of a service or part of a service sanctioned as a separate unit. He relied upon a judgment of this Court in the case of **Prakash R. Borkar vs. Union of India & others reported in 1984 LAB. I.C. 729** where a Lower Divisional Clerk from the Directorate of Transport was transferred to the Directorate of Civil Supplies and the Division Bench held that this should not

be done except with his consent since he was holding a civil post and his working over there was under a guarantee which flows from Article 16 and Part XIV of the Constitution of India. The Division Bench has further held that when a person is transferred from one cadre to another he is sent on deputation and this is always with his consent. In the present case, the action was taken without any consent and was, therefore, bad. He submitted that the transfer has been held not merely to be an incident of service but a condition of service as held by the apex Court in the case of **State of U.P. & another vs. Siya Ram & another reported in 2004 SCC (L&S) 1009.** Respondent No.2 had suffered the loss of incentive bonus which was to the tune of Rs.1,200/- per month since he was transferred to a non-incentive workshop. Mr.Walia, therefore, submitted that the Tribunal was right in entertaining the complaint since there was a violation of the mandate under Section 33(1)(a) of the Industrial Disputes Act.

16. I have considered the submissions of both the Counsel. The propositions laid down by the Division Bench in the case of Prakash **Borkar (supra)** were in the context of a normal transfer and the Division Bench held that one cannot be

transferred outside the cadre except by his consent. In the present case, respondent No.2 had been transferred with the post and it is difficult to say that he was transferred outside the cadre. That apart, at that point of time he was undergoing suspension and receiving only 50% of his salary. It is expected of the employers holding enquiry that if possible they should allow the employees to put in full service provided they can be kept away from the place of the incident. It is, therefore, often felt that it is desirable to transfer the person concerned to a far off place, rather than to suspend him because in suspension he will receive far lesser wages and will not be required to work. Transferring to another place during the pendency of an enquiry and allowing the person concerned to resume, is, in fact, in his own interest. In the present case, it is undoubtedly clear that respondent No.2 was transferred on his request. It is true that he has stated that he should be transferred where diesel trade is in existence. However, that is a secondary aspect of the matter. It is submitted that since respondent No.2 has been posted at a place which is a non-incentive depot, he is not going to receive incentive bonus. In my view, this cannot be a ground for grievance. Respondent

No.2 was receiving half the wages prior to the transfer. Now, he will be receiving full wages with dearness allowance. An incentive is given depending upon the place where he is posted and an employee has no right to say that he should be posted at a particular place itself. Respondent No.2 has admitted in his evidence, as noted above, that there was no agreement that he will be retained only at Parel workshop. It is the conduct on his part which led to an enquiry and charge-sheet and the enquiry was being prolonged and it was in those circumstances that rather than continuing his suspension the Railway Management accepted his request and transferred him to a far off place. Assuming that respondent No.2 will not be receiving incentive bonus of Rs.1200/- per month, he will be receiving his full salary which will be double of what he was getting under suspension. Under Section 33(1)(a) what we are concerned with is as to whether the conditions of service are altered to the prejudice of the workman concerned. I have to consider the totality of the circumstances. In the circumstances, it cannot, by any stretch of imagination, be said that the action taken by the petitioner is to the prejudice of respondent No.2-workman. The Tribunal, therefore, had no

reason to entertain the Complaint and direct that respondent No.2 should be posted at the Parel workshop.

17. In the circumstances, this petition filed by the Railway Administration is allowed and the order dated 9th August 2002 passed by the Central Government Industrial Tribunal, Mumbai, directing the posting of respondent No.2 at Parel workshop will stand quashed and set aside. There will be no order as to costs.

18. Although this petition is allowed, Mr.Walia, learned Counsel appearing for respondent No.2-workman, points out that respondent No.2 has not been keeping well for quite some time and he is presently suffering from a serious ailment of AIDS. He, therefore, desires to stay with his family members who are living in Mumbai. Respondent No.2 may make a representation in this behalf to the Railways and the petitioner will consider it on a humanitarian basis and will see to it that he is given a posting in a nearby district say in Thane District so that he remains away from the place of the incident and at the same time, he can meet his family members frequently.

19. Although both these petitions are thus disposed of, it is to be noted that respondent No.2-workman has been served with the charge-sheet long back i.e. on 19th March 2001. The enquiry has not proceeded thereafter. Mr.Walia informs that not a single witness has been examined. This state of affairs cannot continue indefinitely. In the circumstances, I expect the petitioner-Railway Administration to see that the enquiry is completed at the earliest and in any case, within six months from today. Needless to state that in the event the charges are not proved, respondent No.2-workman will be entitled to get the difference of the pay which has been denied to him in the meanwhile. In the event, the charges are established, the consequences will depend upon the orders to be passed by the concerned Authority.

20. With this order, both the petitions stand disposed of.

(H.L. GOKHALE, J.)